IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b))

Description of case

Writ Petition No. 428 (S/B) 2003

Date of decision- 05.08.2003

For the approval of:-

Hon'ble Chief Justice S.H. Kapadia.

Hon'ble Mr. Justice P.C. Verma, J.

-Whether the order/judgment should be sent to the reporters for reporting? (yes)

-Whether the reporters be allowed to see the judgment? (yes)

(N.C.Melkani)

P.C.

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Writ Petition No. 428 of 2003 (S/B)

Dr. Jagmohan Sharma S/o Sri S.K. Sharma

Resident of Village & P.O. Khadmohan Nagar,

Tehsil- Siyana,

At present Medical Officer/ In-Charge,

Primary health Centre Khanpur Block,

Tehsil- Laksar, District. Haridwar --- Petitioner

Vs.

1. State of Uttarnchal, through Secretary,

Medical & Health Services, Dehradun,

2. Derector General of Medical & Health Services,

Dehradun.

3. Derector General of Medical & Health Services,

U.P., Lucknow.

4. State of U.P. through Secretary Health Lucknow.---- Respondents.

Sri S.S.Yadav, Adcovate for the petitioner

Chief Standing Counsel for the respondents.

Coram: Hon. S.H.Kapadia, C.J.

Hon. P.C. Verma., J.

Dated: 5th Day of August, 2003.

ORAL JUDGMENT: [Per Chief Justice]

1. This writ petition came up for hearing on 5th August 2003 when following order was passed.

> "Writ petition is rejected for reasons to be given separately."

Accordingly, we are now hereby giving reasons.

Reasons

2. Petitioner was selected and appointed in Provincial Medical Services U.P. Petitioner took charge on 12th January 2000 at Primary Health Centre, Khanpur, Haridwar.

3. Prior to the creation of State of Uttarnchal, the petitioner had submitted his option for the State of U.P. This was on 3rd October 2000. The State of Uttaranchal was, however, created thereafter on 9th November 2000. On 6th March 2002, State of U.P. passed an order to give appointments to male Medical Officers in various parts of the State of U.P. This was as per the settlement between the two Stats. Petitioner was asked to report in district Aligarh. This order was passed with the consent of State of Uttaranchal. However, the petitioner was not relieved by the State of Uttaranchal. Though some of the other Medical Officers were relieved. The name of the petitioner was indicated at serial No. 2.

4. The State of Uttaranchal has now passed an order of transfer of the petitioner transferring the petitioner from district Haridwar to Primary Health Centre, Didihat, District- Pithoragarh. This order of transfer is under challenge; it is dated 10th July 2003.

5. It is submitted on behalf of the petitioner that he was appointed in the plain cadre and that he has given the said option of State of U.P. and, therefore, he could not be transferred to any hill districts pending disposal of option as per U.P. Re-organization Act, 2000. It is argued on behalf of the petitioner that once the order dated 6th March 2002 is passed by State of U.P. with consent of both the States, the petitioner should have been relieved by State of Uttaranchal for State of U.P. and that the State of Uttaranchal can't refuse to relieve the petitioner without the consent of the petitioner. It is further argued on behalf of the petitioner that final allocation of the cadre by Central Government would be made in near future. That the cadre of 208 officers shown in the order dated 6th March 2002 was final because both the States have given their consent for officers for the State of U.P. That the petitioner was the employee of State of U.P. under section 73 of the said Act. That there was special or general order of Central Government putting the petitioners under the control of State of Uttaranchal. That no consent or direction has been obtained from Central Govt. for transferring the petitioner from Haridwar to Didihat. That Section 75 of the Act was supplementary to Section 73 and that Section 75 could not be invoked independently ignoring Section 73 and Section 77 of the Act. That the petitioner was suffering from vertigo and, therefore, the transfer order should be revoked. On these grounds, the petitioner has sought cancellation of the transfer order.

6. The Act was enacted by the Parliament to provide for re-organization of the existing State of U.P. and for matters connected therewith. Section 2(a) defines the expression 'appointed day' to mean the day on which the Central Govt. by notification appoints the day on which the Act will come into force. Section 2 (f) defines the law to include enactment, Ordinance, Regulation,

Scheme, Notification or any other instrument having the force of law before 9th November 2000 in the whole or in any part of the existing State of U.P.

7. Section 2 (g) defines the expression "Successor State" to mean the State of Uttar Pradesh or the State of Uttaranchal. Section 2 (k) refers to the expression 'transferred territory' to mean the territory which on the appointed day is transferred from the existing State of Uttar Pradesh to the State of Uttaranchal. Part-VIII deals with Services. Section 72 deals with all Indian Services. Section 73 deals with Services other than all Indian Services. Section 73(1) states, inter-alia, that every person who, before the appointed day, is serving in State of U.P. shall on and from 9th November, 2000 provisionally continue to serve State of Uttar Pradesh unless he is required by general or special order of the Central Government to serve provisionally the State of Uttaranchal. Section 73 (2), inter- alia, states that after 9.11.2000 the Central Government shall decide the successor States to which every person shall be finally allotted for service and the day from which such allotment shall take effect. Section 75 provides for continuance of officers in the same post. It states that every person who, before 9th November 2000, is holding or discharging duties of any post or office in connection with the affairs of the State of Uttar Pradesh shall continue to hold the same post in the successor State and shall be deemed to have been duly appointed to the post by the Government or any appropriate authority in that existing State. There is a Proviso of Section 75 (1). Under the Provision, the Competent Authority is empowered to pass orders affecting the continuance of the person in any such post or office. Section 76 provides for constitution of advisory committee. It, inter- alia, states that the Central Government may establish one or more Advisory Committee for the purposes of ensuring affair of equal treatment to all persons affected by the provisions of Part-VIII.

8. Now in the present case, and there are several petitions of this kind pending in this Court, the question is: whether the Secretary Medical & Health Services, Uttaranchal has the authority to transfer the petitioner from one district of Uttaranchal to the other district of Uttaranchal in the teeth of provisions of Section 73 and in the teeth of order dated 6th March, 2002 passed by State of U.P. Section 73 of the Act deals with provisional continuance in the office or post. It merely states that every person who prior to 9th November, 2000 is serving the State of U.P. shall on or from that day provisionally continue to serve the State of U.P., unless he is required by general or special order of the Central Government to serve provisionally in connection with the affairs of the State of Uttaranchal. The final allotment is provided in Section 75 (2). In the present case, the petitioner was given an option on 3rd of October, 2000 which was prior to the formation of

the State of Uttaranchal. The petitioner opted for the State of U.P. prior to the creation of State of Uttaranchal. However, the petitioner was selected and appointed for Primary Health Centre at Khanpur, Haridwar. This was on 12th January 2000. On the day of formation of the State of Uttarnchal the petitioner was working in relation to the affairs of the State of Uttaranchal. Till today there is no final allotment under Section 73 (3), therefore, the transitory provisions under Part-VIII of the Act and, in particular, Section 73 and Section 75, continue to operate. Section 73 specifically refers to provisional continuance. It states that every person who, before 9th November 2000, serving in connection with the affairs of State of U.P. shall on or from that day provisionally continue to serve the State of U.P. unless he is required by general or special order of the Central Government to serve provisionally the State of Uttaranchal. Section 73 of the Act deals with continuance of services of every person appointed in connection with the affairs of State of U.P. prior to 09.11.2000 whereas, Section 75 deals with every person who was holding or discharging duties of any office in connection with the affairs of the State of U.P. in any area falling within the State of Uttaranchal and who shall by a legal fiction be deemed to be appointed to the post or office in the State of Uttaranchal. Therefore, if any person who is prior to the appointed day, holding any post or office in connection with the affairs of the State of Uttaranchal, shall be deemed to be appointed to the post or office by the government of Uttaranchal. Hence, Section 75 is a special Section whereas; Section 73 is a general Section. Therefore, Section 75 is a deeming provision and a provision of Section 73. In cases where pre-conditions of Section 75 are satisfied, Section 73 cannot be applied.

9. In the present case, we are concerned with Section 75 and not with Section 73. In the present case, we are concerned with the transfer of the petitioner from one district of the State of Uttaranchal to the other district of State of Uttaranchal. Section 75 (1) states that every person who, before 9th November 2000, is holding or discharging duties of any post or office in connection with the State of Uttar Pradesh in any area falling within the successor State of Uttaranchal shall continue to hold the same post or office in the State of Uttaranchal and shall be taken to have been duly appointed to the post or office by the Government of Uttaranchal. Here we would like to distinguish between Section 73 and Section 75. Section 75 specifically refers to a situation where a person is discharging functions or duties of any post or office in any area, which falls within the State of Uttaranchal which is the Successor State. That, in all such cases, the deeming provision of Section 75 will apply and under that provision, on and after 9th November 2000 the person shall be deemed to be appointed to the post or office by the Government of Uttaranchal. In other words, if an officer is posted in an area falling in the State of Uttaranchal and if his post or

office requires him to discharge duties in connection with the affairs of the State of Uttaranchal then, he shall be deemed to be duly appointed to the post be the State of Uttaranchal. This is a pure legal fiction. In this case, we are concerned with the State Re-organization Act. On 9th November 2000, the State of Uttaranchal was created. It was carved-out of the State of U.P. Therefore, the legal fiction become necessary. By virtue of that legal fiction, certain categories of officers are deemed to be serving the State of Uttaranchal, if they were discharging the duties of any post or office in connection with the affairs of the State of Uttaranchal on 9th November 2000.

10. Now we are concerned with the transfer of the petitioner from on district of State of Uttaranchal to the other district of State of Uttaranchal. Continuance of officers in the same posts contemplated by Section 75 covers the issue of transfer. Section 75 covers the issue of inter district transfers. When officers continue to hold the post by virtue of legal fiction within the State of Uttaranchal then transfer is a part of continuance process. In our view, therefore, there is no merit in the petition. In this case, we are concerned with allotment, as provided under Section 75 and not with Section 73 of the Act. Section 73 is a general Section. Section 75 is a special Section. Section-75 applies to a specific situation in cases where a person is holding or discharging duties of any post or office in connection with the affairs of the State of Uttar Pradesh in any area which falls in the State of Uttaranchal shall be deemed to continue in that office as an employee of the State of Uttaranchal. In other words, Section 75 is a Proviso to Section 73. Where pre- condition of Section 75 are fulfilled, Section 75 will over-ride Section 73. In this case, Section 75 is applicable. Hence, State of Uttaranchal was entitled to make inter district transfers. Out reasons are also supported by order dated 6th March 2002 passed by respondent No. 4 State of U.P. This order shows that State of Uttaranchal has agreed to relieve officers posted in State of Uttaranchal in phases in favour of the State of U.P. This order dated 6th March 2002 shows that it is passed in pursuance of Section 75 of that Act to the extent of relieving officers from the State of Uttaranchal in favour of State of U.P. as they had opted earlier for the State of U.P. it is an order falling within Section 75 of the Act.

11. Hence, there is no merit in the petition. The writ petition is rejected.

(Hon. S.H.Kapadia, C.J.) **(Hon. P.C. Verma., J.)**